

**UNITED STATES DISTRICT COURT**  
**DISTRICT OF NEVADA**

JEROME URBAN

Plaintiff,

vs.

DEPUTY BEARD, *et al.*,

Defendant .

3:06-cv-00546-BES-VPC

**REPORT AND RECOMMENDATION**  
**OF U.S. MAGISTRATE JUDGE**

January 27, 2009

This Report and Recommendation is made to the Honorable Brian E. Sandoval, United States District Judge. The action was referred to the undersigned Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and LR IB 1-4. Before the court is plaintiff's motion for default judgment (#59). Defendant Blaine Beard ("defendant") opposed (#60) and plaintiff replied (#61). The court has thoroughly reviewed the record and the motions and recommends that the court deny plaintiff's motion for default judgment (#59).

**I. HISTORY & PROCEDURAL BACKGROUND**

Plaintiff Jerome Urban ("plaintiff") is a prisoner at the Northern Nevada Correctional Center ("NNCC") in the custody of the Nevada Department of Corrections ("NDOC") (#64). Plaintiff brings this action pursuant to 42 U.S.C § 1983, alleging that defendant violated his Fourteenth Amendment rights by failing to protect him from an assault by another detainee when he was housed as a pretrial detainee at Washoe County Detention Center (#6). In his original complaint, which is relevant here, plaintiff named only Deputy Beard, a deputy for the Washoe County Sheriff's Department, as a defendant. *Id.* In his second amended complaint, filed after the instant motion, plaintiff also named as defendants the Washoe County Sheriff's Department, the Washoe County Detention Center, and Washoe County (#64).

The court notes that the plaintiff is proceeding *pro se*. "In civil cases where the plaintiff appears *pro se*, the court must construe the pleadings liberally and must afford plaintiff the benefit of any doubt." *Karim-Panahi v. Los Angeles Police Dep't*, 839 F.2d 621, 623 (9<sup>th</sup> Cir. 1988); *see*

1 *also Haines v. Kerner*, 404 U.S. 519, 520-21 (1972).

## 2 **II. DISCUSSION & ANALYSIS**

### 3 **A. Discussion**

#### 4 **1. Entry of Default**

5 Obtaining a default judgment in federal court is a two-step process – (1) entry of default  
6 and (2) default judgment. *Eitel v. McCool*, 782 F.2d 1470, 1471 (9th Cir. 1986).

7 Rule 55 of the Federal Rules of Civil Procedure states:

8 When a party against whom a judgment for affirmative relief is  
9 sought has failed to plead or otherwise defend as provided by these  
10 rules and that fact is made to appear by affidavit or otherwise, the  
11 clerk shall enter the party's default.

12 Fed. R. Civ. P. 55(a). After the entry of default has been entered by the clerk of court, the party  
13 seeking default may make a motion to the court requesting a judgment of default. Fed. R. Civ.  
14 P. 55(b). If a party has made an appearance in the case, Rule 55(b) requires the court, not the  
15 clerk, to enter the judgment of default. Fed. R. Civ. P. 55(b)(2); *see also Eitel v. McCool*, 782  
16 F.2d 1470, 1471 (9th Cir. 1986) (“[b]ecause McCool had filed a notice of appearance, *entry of*  
17 *judgment* by the clerk under Rule 55(b)(1)... would have been improper. Because of McCool's  
18 appearance, the district court, not the clerk, was required to enter the default judgment.”).

19 There is no right to a default judgment; its entry is entirely within the discretion of the  
20 district court. *See Draper v. Coombs*, 792 F.2d 915, 925 (9th Cir. 1986); *see also Rashidi v.*  
21 *Albright*, 818 F. Supp. 1354, 1356, n.4 (D.Nev. 1993). Defaults are generally disfavored, *see*  
22 *Eitel*, 782 F.2d at 1472, and courts will attempt to resolve motions for entry of default “so as to  
23 encourage a decision on the merits.” *See McMillen v. J.C. Penney Co., Inc.*, 205 F.R.D. 557, 558  
24 (D. Nev. 2002) *citing TCI Group Life Ins. Plan v. Knoebber*, 224 F.3d 691, 696 (9th Cir. 2001).

### 25 **B. Analysis**

#### 26 **1. Motion for Default Judgment**

1 Plaintiff argues that he is entitled to default judgment because defendant filed his answer  
2 late and failed to comply with the court's scheduling order (#59, p. 3, citing #45). Plaintiff  
3 contends that default is merited because defendant failed to submit all discovery by the July 7,  
4 2008 deadline, did not file a dispositive motion by the August 6, 2008 deadline, and did not  
5 submit a pre-trial order by the August 8, 2008 deadline. *Id.* Defendant asserts that he has  
6 complied with all discovery requests and that the court has not ordered him to submit any  
7 additional discovery (#60, p. 3). Further, the dispositive motion deadline does not require a party  
8 to file a motion; rather, it "is merely the deadline for filing such a motion should the parties  
9 decide to file such a motion." *Id.* p. 3-4. Finally, with regard to the joint pretrial order, plaintiff  
10 has also not filed a pretrial order, which warrants dismissal of plaintiff's motion for default. *Id.*  
11 p. 4.

12 Plaintiff has presented no evidence to the court to demonstrate the defendant failed to  
13 comply with discovery requests. Plaintiff has filed no motions to compel discovery, and defendant  
14 states that he has complied with plaintiff's discovery requests. Under Rule 37, the court has the  
15 authority to grant default against a party who fails to comply with court orders to compel. Fed.  
16 R. Civ. P. 37(b)(2)(A)(v). However, "a terminating sanction, whether default judgment against  
17 a defendant or dismissal of a plaintiff's action, is very severe. We review discovery sanctions for  
18 abuse of discretion. Only 'willfulness, bad faith, and fault' justify terminating sanctions."  
19 *Connecticut General Life Ins. Co. v. New Images of Beverly Hills*, 482 F.3d 1091, 1096 (9<sup>th</sup> Cir.  
20 2007), *citing Jorgensen v. Cassidy*, 320 F.3d 906, 912 (9<sup>th</sup> Cir. 2003). There is no evidence  
21 before the court to suggest that defendant acted in bad faith or even failed to comply with  
22 discovery requests. Therefore, the court will not grant a motion for default judgment on this basis.

23 As for plaintiff's claim that defendant failed to file a dispositive motion, defendant is  
24 correct that a party is not required to file a dispositive motion in every action. Rather, if a party  
25 chooses to file a dispositive motion, it must be done by the deadline set forth in the scheduling  
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1 order. Defendant chose not to file a dispositive motion; this choice does not constitute grounds  
2 for a default judgment. With regard to the pretrial order, no trial date has been set. Plaintiff  
3 recently filed a second amended complaint (#64). Again, under these circumstances, there are no  
4 grounds for entry of default judgment.

5 Additionally, defendant answered plaintiff's complaint (#42), and filed a motion to  
6 dismiss plaintiff's second amended complaint (#71). Therefore, defendant has not failed to plead  
7 or otherwise defend. As such, plaintiff's motion for default judgment (#59) is denied.

### 8 III. CONCLUSION

9 Based on the foregoing, the court respectfully recommends that plaintiff's motion for  
10 default judgment (#59) be **DENIED**.

11 The parties are advised:

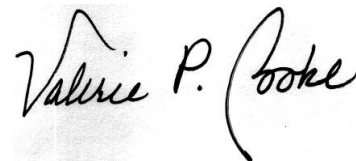
12 1. Pursuant to 28 U.S.C. § 636(b)(1)(c) and Rule IB 3-2 of the Local Rules of Practice,  
13 the parties may file specific written objections to this report and recommendation within ten days  
14 of receipt. These objections should be entitled "Objections to Magistrate Judge's Report and  
15 Recommendation" and should be accompanied by points and authorities for consideration by the  
16 District Court.

17 2. This report and recommendation is not an appealable order and any notice of appeal  
18 pursuant to Fed. R. App. P. 4(a)(1) should not be filed until entry of the District Court's  
19 judgment.

### 20 IV. RECOMMENDATION

21 **IT IS THEREFORE RECOMMENDED** that plaintiff's motion for default judgment  
22 (#59) be **DENIED**.

23 **DATED:** January 27, 2009



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26 **UNITED STATES MAGISTRATE JUDGE**  
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